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No. 80-352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DORIS LEAH KALINSKY, *et al.*,
Petitioners,
v.
GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT McDONNELL DOUGLAS CORPORATION IN OPPOSITION

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The prolix paper lodged in this Court by petitioners — though not labelled a petition for a writ of certiorari — presumably asks this Court to review a decision of the Ninth Circuit upholding the constitutionality of California's long-standing policy of refusing to permit the recovery of punitive damages in wrongful death cases. The "petition" violates a number of rules, including the requirements of "accuracy, brevity and clearness" and the mandate to be "as short as possible." (Sup. Ct. Rules 21.4 and 21.5). It is also laden with scurrilous rhetoric designed to obscure the fact that nowhere do petitioners proffer any reasons which would warrant the grant of a writ of certiorari in this diversity case.

Stripped of its libelous adornments, petitioners' argument boils down to the contention that this Court should review the well-considered opinion of the Court of Appeals for the purpose of constitutionalizing the law of torts. The suggested

vehicles for this judicial legislation are the equal protection clauses of the California Constitution and of the Fourteenth Amendment.

Insofar as petitioners are seeking a restructuring of the law of California, they suggest no reasons why this Court should depart from its traditional practice of refusing to review questions of state law in diversity cases. *See,* 17 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE & PROCEDURE §4036, pp. 30-31. Petitioners also maintain that the California state courts have misread the California wrongful death act (Pet. 43-47). Under *Erie,* of course, the federal courts must take state law as they find it and are without authority to question the correctness of state court decisions on questions of state law. *Day & Zimmerman* v. *Challoner,* 425 U.S. 3 (1975).

Petitioners' federal claim rests mainly on the proposition that the entitlement to punitive damages is a fundamental right and that its limitation must therefore be subjected to strict scrutiny. Such a contention scarcely deserves a response other than to cite this Court's recent holdings in *Duke Power Co.* v. *Carolina Environmental Study Group,* 428 U.S. 459 (1978), and *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618 (1978), that economic measures of this type are to be governed by the traditional rational basis test. The Court of Appeals, not surprisingly, held that a legislative prohibition against a windfall recovery of punitive damages in the emotionally charged atmosphere of a death case — while at the same time permitting full compensatory recovery — fulfills a number of legitimate state interests.

Petitioners' challenge to the judgment below runs headlong into the decision of this Court in *Glick* v. *Ballentine Produce, Inc.,* 385 U.S. 5 (1966). There, an attack was mounted upon the wrongful death statute of the State of Missouri, which contained a specific monetary ceiling ($25,000) on all damages, both com-

pensatory and punitive. The statute was upheld by the Missouri Supreme Court, and on appeal the equal protection challenge was summarily dismissed "for want of a substantial federal question." Under *Hicks* v. *Miranda,* 422 U.S. 332 (1975), that dismissal constituted a ruling on the merits. So, too, in *Jefferson* v. *Chronicle Publishing Co.,* 238 P.2d 1018 (Cal. App. 1952), *appeal dismissed for want of a substantial federal question,* 344 U.S. 803 (1952), the Court refused to entertain an equal-protection attack upon a statute barring recovery of general and punitive damages in certain types of defamation actions. Hence, petitioners' assertion that the issue presented has never been settled by this Court (Pet. 6) is simply wrong.

Nor is there any conflict among the Circuits. The Seventh Circuit in *Huff* v. *White Motor Corp.,* 609 F.2d 286, 298 (7th Cir. 1979), rejected the precise contentions being advanced by petitioners and ruled that a proscription against punitive damages in wrongful death cases does not "affect fundamental rights" and is not irrational. Likewise, in *Cyr* v. *B. Offen & Co.,* 501 F.2d 1145, 1148-49, n. 2 (1st Cir. 1974), the First Circuit upheld a limitation on wrongful death damages by adopting some of the same reasoning as the Ninth Circuit employed in this case:

> "It is clear that the legislature has, in granting a right to recover which did not exist at common law, made a rational distinction between damages that go to the injured party himself and damages that go to his estate. Not only is the plaintiff a different party but there is another ground for legitimate distinction, the element of damages."

Other equal-protection attacks on tort classifications have been routinely rejected by this Court as lacking substance. *See, e.g., Gentile* v. *Altermatt,* 363 A.2d 1 (Conn. 1975), *appeal dismissed for want of a substantial federal question,* 423 U.S. 1041 (1976) ("no fault" insurance statute); *Cannon* v. *Oviatt,* 520 P.2d 883 (Utah 1974), *appeal dismissed for want of a substantial federal question,* 419 U.S. 870 (1974) (guest statute);

Hill v. *Gardner,* 561 P.2d 1016 (Ore. 1977), *appeal dismissed for want of a substantial federal question,* 434 U.S. 989 (1977) (guest statute); *Krause* v. *State,* 285 N.E.2d 736 (Ohio 1972), *appeal dismissed for want of a substantial federal question,* 409 U.S. 1052 (1972) (sovereign immunity).

In sum, the issues sought to be presented by petitioners are constitutionally insubstantial and, in any event, were resolved by the Court of Appeals in a fashion consistent with all the relevant jurisprudence.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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